

1 advisement. I'll take a break and then I'll give you a  
2 ruling.

3 MR. PALERMO: Your Honor, would you like me to  
4 address the other issues that--

5 THE COURT: Sure.

6 MR. PALERMO: --plaintiffs' counsel raised?

7 THE COURT: Go through it all and then I'll take a  
8 break and come back and give you a ruling.

9 MR. PALERMO: Well, Your Honor, there's clearly a  
10 need for the discovery. It's relevant to the Massachusetts  
11 Class three that the Court had certified and is clearly, it  
12 goes to the heart of those allegations. Plaintiffs' counsel  
13 had referenced the discovery against Blue Cross Blue Shield.  
14 That is one, Blue Cross Blue Shield of Massachusetts, Your  
15 Honor, that's one plan. Your Honor, we submit that one plan  
16 alone is insufficient in terms of demonstrating industry  
17 knowledge and the methodologies that are used by the plans.  
18 Dey needs and the Track 2 defendants need discovery on industry  
19 knowledge relating to the third party payers' understandings  
20 and expectations and how they went about reimbursing. In terms  
21 of the scope of the subpoena, there are issues relating to  
22 cross subsidization between the brand and generic drugs. With  
23 respect to the issue of Dey being a Track 2 defendant, Your  
24 Honor, Track 2 defendants are entitled to take discovery and to  
25 pursue discovery and Dey did so recognizing how the Court had

1 ruled in its class certification decision with respect to  
2 certifying the Massachusetts class. That's the focus of that  
3 discovery and it's clearly relevant to that discovery.

4 MR. NALVEN: Your Honor, I did not address the issues  
5 of burden to the Massachusetts third party payers because  
6 counsel for those third party payers are here today and I know  
7 that they would like--

8 THE COURT: Uh-huh.

9 MR. NALVEN: --to be heard with respect to burden.

10 THE COURT: I'll hear you.

11 MS. BANNING: I'm at the end, Your Honor, Susan  
12 Banning for Neighborhood Health Plan. With respect to  
13 Neighborhood Health Plan that is our argument really, burden,  
14 whether it is analyzed under an absent class member under Rule  
15 45. In our view Dey has not made any showing that they need  
16 discovery from this particular health plan or that the need  
17 outweighs the significant burden.

18 THE COURT: How many subscribers do you have?

19 MS. BANNING: We have approximately 125,000 members,  
20 Your Honor, and approximately 300 employees. What NHP does, it  
21 was founded to serve, bring managed care to underserved  
22 populations. Today approximately 80% of its members are on  
23 Medicaid and what NHP does is it contracts with Mass Health.  
24 It's a Mass Health managed care organization to provide that  
25 care. NHP does not have any in-house counsel. It has on staff

1 a grand total of two pharmacists, one of which has already  
2 spent significant time going through these requests and trying  
3 to analyze what would be needed. NHP certainly is not a major  
4 national insurer or anything like the things that other people  
5 have been talking about.

6           What we did try to do, Your Honor, and even that took  
7 a significant amount of time, and I heard a lot about timing  
8 and obviously when I got this subpoena I did not know of all  
9 these various orders, but just with respect to NHP, Your Honor,  
10 contrary to what Dey says, the subpoena to NHP, the original  
11 subpoena, was served on November 14<sup>th</sup>. The documents were due  
12 on November 23<sup>rd</sup>. The deposition was scheduled for December 2<sup>nd</sup>.  
13 I sent three separate pieces of correspondence to Dey including  
14 objections, did not get a response, and that was when we filed  
15 the motion for a protective order. They never would even tell  
16 me that they were taken the deposition off for December 2<sup>nd</sup>.  
17 They did not tell me plaintiffs had filed a motion. I had to  
18 get that information by calling around to other people.

19           After all this happened, Your Honor, Dey sent what  
20 they called a reduced list of drugs and a reduced list of  
21 requests. And we did nonetheless try to respond to that  
22 despite all of these different motions that are outstanding.  
23 And in document number 2089, Your Honor, and the attachment 1  
24 to that, it's our motion to file a supplemental affidavit of  
25 Pamela Siren. And what we try to do in that in the event Your

1 Honor does order discovery is in paragraph 10 NHP explains  
2 what they could produce from the reduced list tabbing it to  
3 their different request, and in paragraph 10 of that affidavit  
4 it lists things like physician fee schedules, contracts with  
5 current and former PBM's et cetera. But what NHP also does is  
6 try to explain why with respect to their size and their  
7 resources in both this affidavit and the other affidavit of  
8 Ms. Siren, this would be an incredible burden and those  
9 arguments, Your Honor, range from everything that we cannot  
10 access our information by J codes. And the best way to see the  
11 dramatic difference is between this J code list of many drugs  
12 and the way NHP accesses its drugs is to look at Judge Saris'  
13 list of drugs and the recent order. That is how they foresee  
14 then can access drugs. They go onto explain why things like  
15 trying to retrieve every piece of correspondence with  
16 providers, every contract out there which there are over 5,000  
17 on site, the rest stored, is for this size organization an  
18 incredible burden and so, again, even with the reduced list we  
19 did try to say what we could produce with the original list.  
20 We filed a variety of objections.

21 THE COURT: Now you're non-profit?

22 MS. BANNING: Yes, Your Honor, we are.

23 THE COURT: All right..

24 MR. PALERMO: Your Honor, I'm sorry, would you like  
25 me to address the burden issues with respect to each--

1 THE COURT: Well one each time if it's easier for  
2 you to keep track of the argument. Go ahead.

3 MR. PALERMO: Thank you, Your Honor. Your Honor,  
4 with respect to the issue of the communications with Dey upon  
5 receipt of the subpoena that's addressed in our papers, Your  
6 Honor, their communications were misaddressed to a lawyer. It  
7 should have been addressed to one lawyer, Kelley Drye, and they  
8 got the person's name wrong, so we were unaware of that  
9 communication till a subsequent communication with my associate  
10 Ms. Trewick and as soon as we became aware of that we  
11 communicated with them. We've expressed our willingness to try  
12 and work with them to narrow the scope. We continue to be  
13 willing to try and address issues relating to burden but they  
14 are--

15 THE COURT: What's the significance of such a small  
16 plan?

17 MR. PALERMO: Well, Your Honor, we're trying, the  
18 allegations in the complaint are so broad that we want to get a  
19 cross section of plans. Blue Cross Blue Shield obviously is a  
20 very large plan, Your Honor. Tufts and Harvard Pilgrim are  
21 smaller plans and Neighborhood and Fallon are smaller scope  
22 plans so what we've tried to do is get a range of plans, Your  
23 Honor, and we think that the four subpoenas are not excessive  
24 and that it's important for us to be able to have discovery  
25 relating to, again, a cross section of those plans.

1 THE COURT: Ms. Josephson?

2 MS. JOSEPHSON: Thank you. Your Honor, Tufts  
3 associated Health Plan is the operational arm of a number of  
4 related Massachusetts related third party payers that I'll just  
5 refer to as Tufts Health Plan. It's the third largest--

6 THE COURT: Covering how many people?

7 MS. JOSEPHSON: It covers just over 600,000 members,  
8 and this makes Tufts Health Plan comparable in size as counsel  
9 for Dey has just said to Harvard Pilgrim whose enrollment is  
10 somewhere between 700 and 800,000 members. In fact, Dey Inc.  
11 concedes in its opposition papers to the plaintiffs' motion for  
12 protective order that it actually chose to direct the subpoena  
13 to Tufts Health Plan precisely because it was comparable in  
14 size to Harvard Pilgrim. But the defendants have already  
15 obtained discovery from Harvard Pilgrim from this comparable  
16 health plan. So in seeking discovery from Tufts Health Plan  
17 Dey Inc. is going beyond a representative sample here and it's  
18 seeking discovery of the only two health plans in this  
19 particular size bracket, Harvard Pilgrim and Tufts.

20 There's no dispute and Dey seems to concede that it  
21 is entitled to discovery from absent class members such as  
22 Tufts Health Plan really only on a showing of need and it has  
23 to meet several criteria including two that I wanted to talk  
24 about. First, upon a showing that the discovery is not unduly  
25 burdensome. And second, that the information is not available

1 from the representative parties. Now, the central  
2 justification for issuing these subpoenas to all of these  
3 Massachusetts health plans in the first place, and you'll see  
4 it in the memos in opposition, was that at the time the  
5 subpoenas were issued there were actually no Massachusetts  
6 health plans that were parties to this case, and that was true  
7 at that time. But everything has changed because this past  
8 Monday on January 30<sup>th</sup> when Judge Saris issued the consolidated  
9 order she certified Blue Cross Blue Shield of Massachusetts as  
10 a representative party of Massachusetts third party payers.  
11 So that problem that the defendants had that justified these  
12 subpoenas is solved. There is no more need to take this broad  
13 sample now that you have a clearly certified representative of  
14 this class of third party payers that's an actual party to the  
15 case. The question at this point is why and how badly do the  
16 defendants need discovery from Tufts Health Plan? What could  
17 Tufts Health Plan actually offer here that's not cumulative or  
18 duplicative where there is now a representative Massachusetts  
19 health plan who's a plaintiff in this case and where the  
20 defendants already have discovery from a health plan that it  
21 concedes is actually comparable in size to Tufts Health Plan.  
22 Between discovery from Blue Cross Blue Shield and Harvard, the  
23 defendants already have information that covers more than 50%,  
24 I have no idea of the percentage, but close to 3,000,000  
25 covered lives in Massachusetts, there is no need to seek

1 discovery from Tufts Health Plan.

2           There also can be no material dispute, there's been  
3 no dispute to the information we've provided by affidavit and  
4 supplemental affidavit about the enormous time, expense, cost,  
5 opportunity cost in terms of diverting attention from vital and  
6 time sensitive business that Tufts Health Plan staff needs to  
7 attend to that would be required in responding to this  
8 subpoena. To comply just with Dey's narrowed request, the 12  
9 document categories that it sent as a compromise proposal, to  
10 comply just with that we would estimate would require 1,500  
11 hours of time, nine months of a full-time equivalence time just  
12 to retrieve and organize the information for production, and  
13 the cost of this labor alone comes to just short of \$80,000.  
14 After retrieval of this information, it would then have to be  
15 reviewed for responsiveness, confidentiality designations and  
16 assertions of privilege.

17           And there's one other thing that I can't  
18 overemphasize, the addition of Blue Cross Blue Shield as a  
19 party to this case adds another even more critical and to Tufts  
20 Health Plan disturbing cost to production in this case. Blue  
21 Cross Blue Shield of Massachusetts is Tufts Health Plan's  
22 largest competitor in a brutally competitive and small market.  
23 Dey has not asked only for fee schedules pertaining to drug  
24 reimbursement but for provider contracts that show exactly what  
25 Tufts Health Plan pays its doctors, the very same doctors that



1 Blue Cross Blue Shield of Massachusetts negotiates with when  
2 all of these health insurers who are competitors set  
3 reimbursement rates, again, not just for drug prices but for  
4 the services that are rendered. There's absolutely no reason  
5 why simply because Tufts meets certain criteria of class  
6 membership in this case that it must deliver up to its largest  
7 competitor its provider contracts. That is the most sensitive,  
8 competitively sensitive proprietary information that Tufts has.  
9 There is no prior order or ruling in this case that would  
10 require such a result. Every time this Court or Judge Saris  
11 has ordered production from absent class members or potential  
12 absent class members, it satisfied itself that there is an  
13 actual need for this information and that there are no undo  
14 confidentiality concerns.

15           The Court has also frequently conditioned discovery  
16 of absent class members upon the defendants' payments of cost  
17 and expenses. On November 2<sup>nd</sup>, for example, this Court ordered  
18 the defendants to pay absent class members for the reasonable  
19 cost of transportation and related expenses, attorney's fees,  
20 and lost income involved in appearing for deposition. On  
21 January 27<sup>th</sup> this Court ordered Health Net to provide redacted  
22 claims data to the defendants as part of its core industry  
23 sample with the defendants to pay the cost of retrieval. We  
24 have offered actually to provide, before Blue Cross Blue Shield  
25 became a party to this case, we have offered to provide our fee

1 schedules. We have offered to provide claims data and even  
2 sample provider contracts with proprietary information  
3 redacted. If the defendants would pay for that effort and if  
4 the confidentiality order that is currently existing in this  
5 case were tightened up in one respect and the respect that we  
6 ask for is this, that the expert certification on the highly  
7 confidential protective order would be tightened up to make  
8 sure that the expert also certifies essentially the same thing  
9 that in-house counsel certifies, that the expert that's  
10 reviewing this information has no business conflict of interest  
11 and that the expert is not involved in actually advising either  
12 health care providers or others negotiating with health care  
13 providers on reimbursement rates. Those suggestions were  
14 rejected by Dey.

15 We would also have no objection if discovery from  
16 Tufts is actually ordered at all to describe in general terms  
17 in a deposition how AWP actually factors into contract  
18 negotiations generally as long as we're not required to  
19 disclose to Blue Cross Blue Shield under any circumstances  
20 directly or indirectly the precise terms of the deal that we  
21 strike with our physician and physician groups. We would  
22 actually have to consider seriously opting out of this class if  
23 that would protect us and prevent us from having to disclose  
24 that and that's a result to be avoided because that would allow  
25 the defendants actually to be using discovery as a weapon--

1 THE COURT: Uh-huh.

2 MS. JOSEPHSON: --and to reduce potential claimants.  
3 So Dey has not agreed to this limited production or to payment  
4 of anything beyond claims data retrieval costs or to enhanced  
5 confidentiality protection and essentially stands by its  
6 subpoena even though it's overreaching in several respects. It  
7 stands by a list of subject drugs that is far different and far  
8 broader than was attached to the consolidated order that Judge  
9 Saris issued on Monday. I'm willing to settle for fees  
10 schedules, claims data and sample contracts. Dey wants all of  
11 Tufts documents not only that reflect reimbursement for drugs  
12 but all documents reflecting anyone's thinking about the price  
13 of drugs and any communications with physicians about the price  
14 of drugs or the cost of drugs over the entire 14 year period  
15 that they're concerned about. This creates an unworkable  
16 burden for Tufts. We would have to look through every document  
17 we have to figure out if there is something that would  
18 potentially be responsive to that request.

19 According to Judge Saris the open question in this  
20 case is a simple one, is AWP relevant to health plans in  
21 connection with setting reimbursement rates with physicians for  
22 physician administered drugs? Dey Inc., the defendants, do not  
23 need 14 years of provider contracts, 14 years of communications  
24 with physicians, 14 years of committee meetings from defendants  
25 that are or from absent class members that they already have

1 information from comparable ones. They just don't need this  
2 information to answer that simple question. If there is to be  
3 any discovery of Tufts Health Plan at all, we have a number of  
4 conditions and I'd be happy to submit them in the form of a  
5 proposed order but we would really--

6 THE COURT: Well that's the next step. So let's--

7 MS. JOSEPSON: Okay. We'd ask this Court to  
8 seriously consider the position that we urging here that the  
9 defendants have what they need now with the representative  
10 party named as a party and with the comparable discovery from  
11 Harvard Pilgrim. Thank you.

12 THE COURT: All right, on behalf of Fallon? Do you  
13 want to respond?

14 MR. PALERMO: However Your Honor would prefer.

15 THE COURT: No, we'll do it one on one so go ahead.

16 MR. PALERMO: Okay.

17 THE COURT: I'll hear you.

18 MR. PALERMO: Your Honor, with respect to the issues  
19 relating to the confidentiality because of that information,  
20 those issues were already raised and addressed by the Court in  
21 the Health Net motion to compel where the Court ruled on  
22 January 27<sup>th</sup> of last year ruling that the confidentiality order  
23 is in place to protected third parties, Your Honor, and we  
24 believe that the orders that are currently in place to provide  
25 sufficient protection to third party payers including Tufts and

1 the other third party plans.

2 With respect to the issue of the burden, Your Honor,  
3 again, we're looking at the complaint. The scope of the  
4 complaint is what it is, Your Honor, and the allegations in the  
5 case go to the issues we've identified in our request, we've  
6 narrowed the request. We're willing to try and work with Tufts  
7 and the other entities to resolve them. And, Your Honor, I  
8 think the experience with respect to the plans that it  
9 previously responded to subpoenas is inconsistent with the  
10 representations about the burden that Tufts identifies. And  
11 with respect to the issue of Blue Cross Blue Shield  
12 Massachusetts, Your Honor, given their size in Massachusetts,  
13 we think that the other subpoenas and information from the  
14 other plans are necessary to get the cross section that we've  
15 identified. The different size plans, their knowledge if we  
16 can demonstrate that plans that are smaller than Blue Cross  
17 Blue Shield have knowledge concerning an understanding of what  
18 AWP is and how they go about reimbursing, obviously I think  
19 that's highly relevant to the case and not-for-profit plans  
20 aren't exempt from the discovery but just because they're not  
21 for profits. Your Honor, I think consistent with the Court's  
22 prior rulings we're entitled to get this discovery and with  
23 respect to the burden issues, Your Honor, I think that we can  
24 work with Tufts to try and resolve those issues consistent with  
25 getting the discovery that's been ordered in prior instances.

1 Thank you, Your Honor.

2 THE COURT: All right. Do you want to reply briefly?

3 MS. JOSEPHSON: Could I just very, very briefly. I  
4 just wanted to point out because counsel for Dey referenced the  
5 action that you took on the Health Net issue, this is the  
6 transcript of that hearing is attached to document 1940-1 at  
7 Exhibit E, and in that hearing it was very clear that one of  
8 the factors that the defendants brought forward to convince you  
9 to order discovery from Health Net was that there was no  
10 competitive relationship between Health Net and any of the  
11 parties in the case, also, that the defendants only sought a  
12 representative sample of contracts and that is sample not what  
13 their position is here. Thank you.

14 THE COURT: All right, on behalf of Fallon?

15 MR. SATURLEY: Thank you, Your Honor, William  
16 Saturley on behalf of Fallon Community Health Plan. Fallon has  
17 171,000 members, Your Honor, and they are largely located in  
18 Worcester County in the Commonwealth. My brothers have already  
19 ably dealt with whether or not there's a benefit to the  
20 defendants of pursuing this subpoena issuance, and so I will  
21 certainly pass over that other than I endorse the arguments  
22 that have been made by Attorney Nalven.

23 We've only been involved in this, my law firm, since  
24 December 22<sup>nd</sup> and so there's been an awful lot--

25 THE COURT: You're lucky.

1 MR. SATURLEY: --to try to catch up with, and I'm  
2 hoping you'll let me stay lucky, Your Honor, and grant our  
3 motion because from our standpoint while the subpoena that was  
4 served on Fallon maybe a narrowed subpoena it's quite  
5 significant. It asks for in essence if read largely and on its  
6 face, it essentially asks for every piece of paper that Fallon  
7 has generated or collected in one form or other for the past 14  
8 years.

9 The first document request seeks all schedules  
10 disclosing the amounts reimbursed to physicians for any  
11 services rendered or drugs administered. Your Honor, the way  
12 that Fallon does its business is it signs a separate contract  
13 with every physician or every entity that employs physician or  
14 every provider every year. That's on average 8,000 contracts  
15 per year times 14 years is approximately 110 to 120,000  
16 contracts. In order to determine and to go through the process  
17 of reviewing those contracts to strike them for privilege, to  
18 determine whether they were responsive at all, to worry about  
19 the commercial information that my sister has addressed, would  
20 require just in and of itself the equivalent of 50,000 hours  
21 worth of work. Fallon cannot meet that burden. That's just  
22 the first category of 12.

23 The second category, for instance, please give us all  
24 electronic claims data, in essence is what it says. Fallon  
25 receives tens of thousands of electronic claims every day. In

1 order to comply with a request that would entail a review of  
2 millions of claims. There is no electronic computer search  
3 mechanism that would allow us to respond to the subpoena and go  
4 through the process we would need to in order to determine if  
5 those records were compliant, determine if there was  
6 information in there that we should not produce. So, again,  
7 we're talking a manual review process. Fallon has already told  
8 you in the context of the companies that are involved here is  
9 very small. It has a total of 525 employees, 200 of them in  
10 the administrative capacity. They're all very busy. The  
11 affidavit of Daniel Conquer, which is document number 2783,  
12 sets forth the other things that Fallon is doing today. Fallon  
13 is trying to convert all of its records and answer multiple  
14 inquiries just with regards to the Medicare Part D change that  
15 was made with regards to the health reinsurance business as of  
16 January 1. Fallon is also preparing for a Medicaid site visit  
17 upcoming. Fallon is undergoing a Department of Insurance  
18 investigation right now, an annual site visit. Fallon is  
19 preparing for its two week audit in order to file its 501(c)(3)  
20 information, et cetera, et cetera, et cetera. Fallon's staff  
21 are working up to 80 hours a week now to comply with their  
22 existing obligations. To undertake any response to the  
23 subpoena as stands or even as what might, from your situation  
24 might appear to be a reasonable accommodation, why not do it  
25 for instance for the past three years all the records on site



1 as opposed to iron mountain still remains an overwhelming and  
2 unreasonable burden to Fallon.

3 I will say that we have communicated with counsel for  
4 Dey. They have been polite. They have been responsive. We  
5 haven't had any problem talking with each other, but we are up  
6 against the unassailable fact to respond to the subpoena either  
7 as stated or as modified in a way that would be acceptable to  
8 Dey is an incredible, unreasonable burden to a very small  
9 company. And we ask under those circumstances that you just  
10 say, that's not necessary, the subpoena on Fallon is squashed.  
11 Thank you.

12 MR. PALERMO: Your Honor--

13 THE COURT: Clearly the theme all the way across the  
14 board with all three entities is burden here.

15 MR. PALERMO: Well, Your Honor, in the last argument  
16 counsel's argument seemed to be that any response would be too  
17 burdensome because they're too busy with all the other things  
18 that they have to do. What we've tried to do with our narrowed  
19 request, Your Honor, is narrow them to exactly the same  
20 discovery that Your Honor has permitted on numerous prior  
21 occasions. The Court has previously ordered discovery from  
22 Blue Cross Blue Shield and Mutual of Omaha even though they're  
23 small plans. Small plans are particularly relevant here with  
24 respect their knowledge of reimbursement and their methodology,  
25 and they're highly relevant to the allegations that are at the

1 heart of this case, Your Honor. And we have really tried to  
2 narrow those requests and tried to be consistent with what's  
3 been permitted over and over and over again. Thank you, Your  
4 Honor.

5 THE COURT: All right. I'll take the morning recess  
6 at this time. All right, 10 minutes.

7 (RECESS)

8 THE COURT: All right, having given the matter some  
9 further thought and having heard extensive argument in  
10 reference to docket entries 1907, 1909, 1910, 1914, 2005 and  
11 2091, I will grant the plaintiffs' motion for protective orders  
12 in those individual motions, and I will grant the motions to  
13 quash as well. Having reevaluated the situation and having  
14 heard really very extensive argument on burdensomeness today, I  
15 believe that the presence of Blue Cross Blue Shield in the  
16 litigation at this time does change things, and I feel that the  
17 oppressiveness of the burden as has been outlined by counsel  
18 for the three health plans is quite dramatic. I'm also  
19 concerned about the issues of confidentiality. I think there  
20 are serious confidentiality issues here in a competitive  
21 situation, and for that reason I'm very much concerned about  
22 the rights of the non-parties and, therefore, grant the  
23 motions.

24 All right, I believe we have one remaining motion and  
25 that is 1820, which is plaintiffs' motion to compel production

1 of Amgen.

2 MR. NALVEN: Your Honor, this will be a brief motion.  
3 I didn't know if you wanted to excuse counsel who had already  
4 been heard?

5 THE COURT: Yes. If counsel who have been heard  
6 don't want to stay for the remainder, you're welcome to leave  
7 at this time.

8 MR. YOUNG: Your Honor, I didn't have an opportunity  
9 to introduce myself earlier. My name is Joseph Young. I'm  
10 with the law firm of Hogan & Hartson in Baltimore. I represent  
11 Amgen Inc.

12 THE COURT: And the spelling of your last name?

13 MR. YOUNG: Young, Y-O-U-N-G--

14 THE COURT: Oh.

15 MR. YOUNG: --Your Honor.

16 MR. COMMISSO: Good morning, Your Honor, John  
17 Commisso of Kelly Libby & Hoopes. That's Commisso, C-O-M-M-I-  
18 S-S-O.

19 THE COURT: We know that, Mr. Commisso, having had  
20 you in court yesterday.

21 MR. NALVEN: Your Honor, I know that it's been a long  
22 morning so I'll be brief on this motion.

23 THE COURT: Well not as long as many others.

24 MR. NALVEN: Your Honor, Amgen is one of the Track 2  
25 defendants in this case and Amgen manufactures a drug by the

1 name of Aranesp among others which is a competitor of the drug  
2 Procrit which is a drug manufactured by Johnson and Johnson.  
3 These drugs are chemically identical. And I raised that with  
4 Your Honor at the outset just to assure you that as Your Honor  
5 knows the drugs that are at issue in the cases has changed--

6 THE COURT: Uh-huh.

7 MR. NALVEN: --have changed over the course of the  
8 case but the heartland of the case has always been physician  
9 administered drugs where there's either therapeutic or chemical  
10 identity and so Amgen's manufacture of Aranesp makes Amgen a  
11 central focus of the AWP MDL. I think the papers candidly  
12 submitted by both parties fairly fully explore the issues for  
13 Your Honor but I'll summarize briefly. The plaintiffs served  
14 several document requests on Amgen beginning in late 2003 and  
15 into early 2004, including what might be referred to as a  
16 summary or omnibus request in March of 2004. There was no  
17 production by Amgen at that time. The papers I think by both  
18 sides sort of identify a series of communications that Your  
19 Honor probably doesn't want to get bogged down in about who  
20 acted first and who acted next, but I think what's significant  
21 to understand is that by May of 2005 plaintiffs were closely  
22 focused on obtaining discovery from Amgen and in fact on May  
23 26th of 2005 my partner Steve Berman provided counsel for Amgen  
24 with a very detailed memo, it was actually an internal memo but  
25 it was provided without waiver, and I think for that reason

1 counsel did not attach it to his papers. But it was a very  
2 detailed memo identifying the categories of documents that  
3 would satisfy plaintiffs in connection with the earlier  
4 document request.

5           At the time that we filed this motion, which was  
6 October of 2005, plaintiffs still had not received any  
7 production from Amgen of a documentary nature. Plaintiffs had  
8 only received some transactional data. Now remember that at  
9 the time that we filed that motion, the discovery cutoff for  
10 Track 2 which is still in place, although there's a motion  
11 pending concerning this matter, was December 3<sup>rd</sup>, and even as  
12 recently, I think shortly after the motion was filed Amgen did  
13 begin to produce some documents. As of a couple of days ago  
14 I'm told by one of my colleagues that Amgen has produced about  
15 43,000 pages of documents and has represented that it believes  
16 its production to be complete. We believe the production to be  
17 far, far, far from complete. As Your Honor knows the primary  
18 focus in terms of company of my work in this proceeding has  
19 been Glaxosmithkline and I can tell you that Glaxosmithkline,  
20 for example, produced in excess of 3,000,000 pages of  
21 documents.

22           THE COURT: Yes, but how can you say it until you've  
23 really taken a look?

24           MR. NALVEN: Well, we are taking a look, Your Honor,  
25 but at this point we can really identify for you one very

1 specific and very troubling issue in this case or actually I  
2 would take two specific and troubling issues. The first is  
3 that as a result of the very, very late production and what we  
4 believe to be, we know to be a partial production, we don't  
5 know how partial, at this point plaintiffs have been very  
6 seriously prejudiced. We have discovery - the discovery period  
7 already ended and we're only beginning to receive documents  
8 now. Except for some initial 30(b)(6) depositions we were  
9 unable to take depositions that were meaningful because we  
10 didn't have documents. Amgen, whatever its excuses for not  
11 producing documents prior to let's say May of 2005, certainly  
12 by May there was no question that it was very clear what it is  
13 we were looking for, and sat on our requests for an additional  
14 period of time and in fact did not begin producing until we  
15 filed. In our motion we are asking for sanctions which will  
16 allow us not only to obtain documents more quickly but also  
17 will send the message to Amgen and defendants that the Court is  
18 not going to tolerate violations of CMO's and discovery  
19 obligations.

20           The second issue that is of very special concern,  
21 Your Honor, is the time period that Amgen claims it has to  
22 produce documents with respect to. Amgen has taken the  
23 position in this case that it need only produce documents for  
24 the period 1997 to 2001 or sort of creeping into 2002. Sort of  
25 at the last exchange between one of my colleagues and Amgen's

1 counsel, Amgen's counsel said that it would return to its  
2 client to see whether that position could be modified, but that  
3 position is inconsistent with the complaint in this case which  
4 seeks data and documents since 1991. The conduct of other  
5 defendants in the case, including Glaxosmithkline which for  
6 example Your Honor produced documents from 1991, and it's  
7 inconsistent most importantly with Judge Saris' recent class  
8 certification order which certifies a class for the period 1991  
9 to 2005. Plaintiffs need this critical information from this  
10 critical defendant promptly, a full production promptly for the  
11 entire class period. So in addition to, among the sanctions  
12 that we seek, Your Honor, among the relief that we seek in  
13 terms of prompt production is a full and complete production  
14 that at this point is now within the next 60 days in order to  
15 review the documents and prepare for further testimonial  
16 discovery. Thank you, Your Honor.

17 THE COURT: All right, I'll hear you, Mr. Young.

18 MR. YOUNG: Thank you, Your Honor. First, I think  
19 the Court needs to focus on what it has before it. The motion  
20 that was filed in October was a motion for sanctions based on  
21 essentially what plaintiffs claim was Amgen's complete refusal  
22 to conduct discovery. And the documents that were attached to  
23 our briefs, let me make clear that there was no waiver, objects  
24 were timely filed, they were all pursuant to express  
25 understandings and agreements with plaintiffs' counsel, not Mr.

1    Nalven but his other lawyers in his office, and that there is  
2    in fact a documented record of that exchange.

3               We, also I think, and this is important in thinking  
4    through other sanctions are at all appropriate in this context,  
5    Amgen did early on push for a meet and confer as of last  
6    December and it did take five months for a sit down and a final  
7    meeting with Mr. Nalven's partner to get the list that he  
8    described, the detailed list that narrowed the production, in  
9    fact narrowed the production in order to avoid the 3,000,000  
10   page production that Mr. Nalven commented about from another  
11   defendant in the Track 1 case. Our purpose was to focus it,  
12   narrow it, make it tight so that it's not a strict, you know, a  
13   broad data dump. The data was provided within a month of that  
14   time pursuant to a request to modify the original data request  
15   that had been made. That took time with the experts, and we  
16   began reviewing over the summer.

17              The production was made beginning of October and it  
18    was made in fact the day after plaintiffs had filed their  
19    motion to compel. Had they called and said we're about to file  
20    a motion to compel, we would have said we're filing our  
21    documents Monday. But the document production began in  
22    October, which was consistent with our representations to Judge  
23    Saris in connection with the scheduling issue that was filed in  
24    late September and early October on Track 2 discovery, and it  
25    continued on a rolling production through December and



1 completed in January. We are substantially completed the  
2 production of the limited discovery requests that were the  
3 result of a meet and confer with Mr. Berman in May.

4           So, first, with respect to the motion to compel on  
5 for sanctions with respect to discovery, Amgen believes that it  
6 did work in good faith to resolve issues, that the parties  
7 understood that and the production proceeded accordingly. And  
8 in fact, had we gotten in December of 2004 where we were in May  
9 of 2005, it would have all been over by July and none of us  
10 would be here this morning.

11           With respect to the two troubling issues that  
12 Mr. Nalven refers to, the timing of production and the effect  
13 on discovery scheduling, that is precisely the issue before  
14 Judge Saris on two competing CMO's that were submitted in  
15 December of 2005. The plaintiffs use the same kinds of  
16 arguments with respect to defendants' productions, not just  
17 Amgen's, but a broad number of defendants, and requesting an  
18 extension of discovery till June. The defendants in the Track  
19 2 have requested or suggested an extension to allow additional  
20 discovery through March. I think an important point there is  
21 that both parties understood and in fact Judge Saris in what  
22 has been called her holiday order understood that December 3<sup>rd</sup>  
23 wasn't likely to be the firm cutoff, that the parties, I think  
24 she said, shouldn't kill themselves over the holidays, and she  
25 was going to deal with scheduling after, my guess is after she

1 dealt with the Track 1 house and put that in order that she'd  
2 then deal with Track 2 and the parties are waiting on that  
3 schedule from Judge Saris at this time.

4           On the timeframe issues, Your Honor, I do not believe  
5 that that is properly before the Court this morning. It is not  
6 the subject of the motion to compel. There is not a word in  
7 their motion to compel with respect to timeframe. And in fact,  
8 it was not something that was even discussed when Mr. Berman  
9 and Mr. Barley and I met by telephone back in May. The first  
10 occasion that the timeframe exception that Amgen put into its  
11 objection was back in 2004 and repeated in June of 2005 over  
12 initial production. The first reference to that was in a  
13 letter on January 9, 2006, about two weeks ago. And I think  
14 more important, more to point, we have been involved in meet  
15 and confers with Mr. Nalven's associate in the Seattle office,  
16 Rob Lopez, as late as Tuesday and have made I believe  
17 substantial progress on a number of the categories of documents  
18 and what accommodations could be made and Amgen would be  
19 willing to make.

20           In light of Judge Saris' order with respect to the  
21 Track 1 class certification, the plaintiffs have now taken the  
22 position that discovery must be from 1991 through January 1,  
23 2006, through to the present, which is two - well, first of all  
24 it's beyond anything that's been requested of any other  
25 defendant in the case that I'm aware of beyond what they

1 negotiated with other defendants and I think, frankly, beyond  
2 what Judge Saris probably contemplated. I don't believe that  
3 in certifying that class she was thinking about reopening  
4 discovery or reopening document productions for the Track 1 or  
5 the Track 2 defendants. I think that the key here is to focus  
6 on documents that are central to the timeframe of the alleged  
7 scheme that the plaintiffs have presented, which is 1997, five  
8 years prior according to the defendants through to the date of  
9 the filing of those first complaints in 2001 and 2002, and they  
10 will involve the core documents that, you know, that the  
11 plaintiffs need. Mr. Nalven mentioned Aranesp and Procrit;  
12 well Aranesp was preceded by a drug called Ibogen and Ibogen  
13 and Procrit are also competitive drugs, and there are clearly  
14 documents encompassed in our five year production that meet the  
15 plaintiffs' request and meet their needs with respect to  
16 showing if there was a competitive effect and how that  
17 competitive effect led to pricing.

18 THE COURT: Briefly.

19 MR. NALVEN: Your Honor, I think you can hear from  
20 both arguments that there is not really a great deal of dispute  
21 here, critical points. To begin with, counsel says that the  
22 motion before Your Honor doesn't cover the timeframe issue.  
23 Well, of course the motion that was before Your Honor was  
24 before was served before any documents were produced. Clearly  
25 the timeframe issue is subsumed in a motion in which somebody,

1 which is made in response to no document production. With  
2 respect to the timeframe itself, counsel does not dispute that  
3 the period for production ought to be the period set forth in  
4 Judge Saris' class certification order and doesn't dispute in  
5 any way the propriety of the demand for production from 1991 to  
6 1997. The issue that he raises is whether the production ought  
7 to be, ought to end at the end of the class period or whether  
8 because some defendants who produced promptly in response to  
9 the omnibus request that was served in March of 2004, whether  
10 Amgen ought to get the same benefit that they did where on a  
11 defendant by defendant basis there have been different  
12 agreements and arrangements made depending on how the case  
13 proceeds. For example, with Glaxosmithkline we have an  
14 agreement that allowed Glaxosmithkline to forbear from  
15 producing its most recent transactional data pending summary  
16 judgment or some other milestone in the case.

17 In terms of the time at which or the deadline for  
18 production, as Your Honor knows there are motions before Judge  
19 Saris to extend that period of time. Plaintiffs now are  
20 helpless. We don't know what the period is but we know that  
21 it's going to be sometime in the next few months and we still  
22 don't have anywhere near a full production. So we request -  
23 one other point, Your Honor, Mr. Young said that he was  
24 involved in active, an active meet and confer discussion and  
25 I've talked extensively with my colleagues in Seattle about

1 this, and my colleagues in Seattle have notified Mr. Young and  
2 have told me that while the discussions have been cordial, that  
3 at this point they're going nowhere and that there is no longer  
4 a fruitful meet and confer. Our position is that we need  
5 documents for the entire period and we need them in sufficient  
6 time to review them and to take some depositions.

7 THE COURT: What's your position, Mr. Young, on the  
8 completion of what you intend to produce at this time?

9 MR. YOUNG: Your Honor, the documents that Amgen  
10 produced in response to the narrowed request that Mr. Berman  
11 provided to us in May that is essentially complete. The  
12 shortcomings that Mr. Nalven is referring to, I received my  
13 first notice of that last night in an email sent after hours to  
14 me to which I responded this morning from his associate in  
15 their Seattle office. They're not at issue this morning in any  
16 event. We're trying to work through with them, and I guess  
17 what I'm asking Your Honor is allow us to use the process that  
18 the local rules establish. We're trying to do that. The most  
19 recent conversation was on Tuesday of this week at which time I  
20 was promised to get a letter that I could provide my client and  
21 I, at least my position with Mr. Lopez was I want to review  
22 that with my client, I want to see what we can provide and what  
23 we can't or what we can agree on and there were categories that  
24 we agreed on that we would assent to. And as far as I'm  
25 concerned that process is still an open one, and if we need to

1 come back to the Court in two weeks or three weeks or whenever  
2 we need to, we can do it at that time, but it's simply not ripe  
3 at this time.

4 THE COURT: Yeah, I think based on what's happened  
5 this motion as it's framed presently is now moot, and if you  
6 need to renew it you may. All right.

7 MR. YOUNG: I appreciate that, Your Honor. Thank  
8 you.

9 THE COURT: I think that resolves everything that's  
10 on the table for today. Any counsel want to raise anything  
11 else?

12 (Pause)

13 THE COURT: All right. Then we stand in recess.

14 MR. NALVEN: Thank you, Your Honor.

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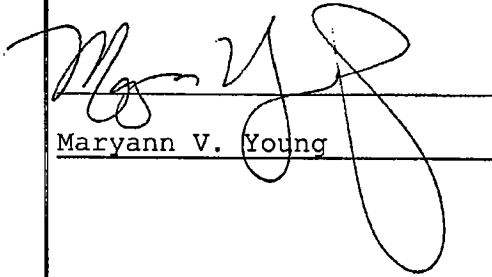
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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

  
\_\_\_\_\_  
Maryann V. Young

February 24, 2006

# EXHIBIT D



Message

Page 1 of 3

**Parekh, Niraj (x2641)**

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**To:** Mangi, Adeel A. (x2563)

**Subject:** RE: United

-----Original Message-----

**From:** Mangi, Adeel A. (x2563)

**Sent:** Thursday, March 02, 2006 10:21 AM

**To:** Parekh, Niraj (x2641)

**Subject:** FW: United

-----Original Message-----

**From:** Mangi, Adeel A. (x2563)

**Sent:** Wednesday, February 15, 2006 5:13 PM

**To:** 'Prame, Michael'

**Subject:** RE: United

sure

-----Original Message-----

**From:** Prame, Michael [mailto:MJP@groom.com]

**Sent:** Wednesday, February 15, 2006 5:10 PM

**To:** Mangi, Adeel A. (x2563)

**Subject:** RE: United

Are you around in the morning?

---

**From:** Mangi, Adeel A. (x2563) [mailto:AAMANGI@PBWT.COM]

**Sent:** Wednesday, February 15, 2006 5:04 PM

**To:** Prame, Michael

**Subject:** RE: United

Mike:

Thanks for your email and apologies for the delay in getting back to you. In response to your questions:

- At this stage, defendants are willing to narrow the request calling for PBM reports and MAC lists to facilitate timely production. We will accept rebate reports showing any drug manufacturer rebates paid directly to United or passed onto United by its PBM in lieu of full production on these categories.
- The defense group experts include Charles River Associates and Bates White. Plaintiffs experts include Raymond Hartman and Meredith Rosenthal. The terms of the protective order are self explanatory in terms of their application to experts and consultants. Those provisions have been fully complied with by defendants.
- Attached is the current list of drugs as to which we seek claims data and fee schedules. As discussed, we also seek fee schedules for services related to drug administration.

Let me know if you have any questions.

-----Original Message-----

3/10/2006

Message

Page 2 of 3

**From:** Prame, Michael [mailto:MJP@groom.com]  
**Sent:** Monday, February 13, 2006 4:22 PM  
**To:** Mangi, Adeel A. (x2563)  
**Cc:** Fitzgerald, Tom; Golumbic, Lars  
**Subject:** RE: United

Thanks for your message Adeel.

A couple of thoughts...

1. United will likely file objections to the ruling with Judge Saris. I should know in the next few days whether United will appeal the entire order or only parts thereof (e.g., the requests for fee schedules, claims data and depositions). I need to confirm with the client, but I expect that, if United does not appeal the entire order, it would attempt to produce in the near future the documents responsive to unappealed portions of the order.
2. We would like continue discussing the requests with you as we seek further guidance from Judge Saris. To that end, a couple of questions:
  - a. In light of the class rulings limiting the case to physician administered drugs, why are Defendants seeking the PBM rebate reports and MAC Lists related to the retail pharmacy program? After sending the May 27 letter to us, Jessica had not pressed for the production of these materials during our follow up discussions.
  - b. I assume that you have identified your experts/consultants? Could you tell us who they are so that we would know who may have access to United's confidential information? Would our information be shared with Plaintiffs and their experts/consultant also? If so, who are they? Who else has been given access to the highly confidential information of third-party witnesses?
3. Is there an updated list of drugs for which you are seeking claims data and fee schedule information?

Thanks

MJP

---

**From:** Mangi, Adeel A. (x2563) [mailto:AAMANGI@PBWT.COM]  
**Sent:** Friday, February 10, 2006 6:28 PM  
**To:** Prame, Michael  
**Subject:** United

Mike: We have not heard from you since last week's ruling. Is United pressing ahead with production of documents and generation of a fields listing for claims data or are there issues we need to discuss? If there are, let's do that Monday when you are available.

Thanks

Adeel Abdullah Mangi  
Patterson, Belknap, Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036  
Ph: (212) 336 2563  
Fax: (212) 336 7947  
aamangi@pbwt.com

3/10/2006

Message

Page 3 of 3

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3/10/2006